

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

To be argued by:
HAROLD BORG

77-1413

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

-against-

LOUIS SANTOS,

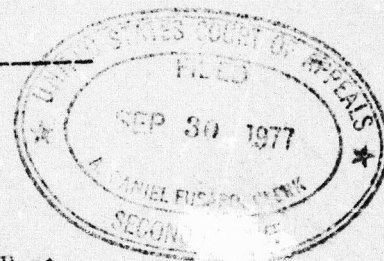
Defendant-Appellant.

*On Appeal from the United States District Court
for the Southern District of New York*

APPELLANT'S BRIEF

HAROLD BORG
Attorney for Defendant-Appellant
123-60 83rd Avenue
Kew Gardens, N.Y. 11415
(212) BO 1-1200

Of Counsel:
ALAN M. SNYDER



Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT
- - - - -X

UNITED STATES OF AMERICA

Respondent

No. 77 CR 135

-against-

LOUIS SANTOS

Defendant-Appellant

- - - - -X

On Appeal from the United States
District Court for the Southern
District of New York

BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York, entered on July 11, 1977, convicting the appellant, after a trial by jury (Metzner, J.), of the crime of Conspiracy to Violate Section 241 Title XVIII of the United States Code, and sentencing appellant to imprisonment for a term of six years.

Issue Presented for Review

This appeal presents the question of whether the District Court erred in not permitting the testimony of Mr. John Nicholas Ianuzzi to be heard at the time of the trial of this matter.

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Specifically, this Court is asked to determine whether the District Court erred in holding that the testimony that Mr. Ianuzzi would have given, was the product of a privileged communication made to him by one Joseph A. Salvato.

STATEMENT OF THE CASE

Nature of case, Course of Proceedings
and Disposition of Case by
District Court

Defendant-appellant, Louis Santos together with Salvatore Scudiero, Joseph Pecorino, Joseph Anthony Salvato, Philip George Felice and Carlos Cabrera were indicted by a Federal Grand Jury and charged with the crime of Conspiracy to Violate Section 241 Title XVIII of the United States Code.

The matter was tried in the United States District Court for the Southern District of New York before the Honorable Charles M. Metzner and a jury, from May 9 until May 18, 1977.

On May 18, 1977, the jury returned a verdict of guilty against Louis Santos for the crime of Conspiracy to Violate Section 241 Title XVIII of the United States Code and on July 11, 1977 he was sentenced to imprisonment for a term of six years.

On July 13, 1977, timely notice of appeal was filed.

STATEMENT OF FACTS

(Since this appeal deals with the sole issue of whether the communications from Josep Salvato to John Ianuzzi, Esq., fall within the attorney-client privilege, the statement of facts in this matter is limited to those parts of the record.)

THE TRIAL

THE GOVERNMENT'S CASE

During the course of the trial the Government called as a witness JOSEPH A. SALVATO, one of the indicted defendants, who testified he knew Louis Santos for approximately four years, having first met him at the Alley Cat Bar in 1973 (T. 931-932, 976)¹.

From 1973 up until the time of Finn's death, Salvato saw Louis Santos two or three times a month in either the Alley Cat or in Separate Tables, both bars (T. 933, 976).

Salvato first met Anthony Finn eight or nine months prior to Finn's death and had, during that time, sold him two-eighths of cocaine valued around \$7,400 (T. 934-935, 977).

1 Numerical references are to Trial Minutes of May 9, 10, 11, 12, 13, 1977.

About two weeks prior to Finn's death, Santos had told Salvato that he had the word from a Thomas Petito that Tony Finn was an informer for the DEA (T. 935-936). Again, on the night of March 4th, while in the Separate Tables Bar, Santos reiterated to Salvato that he, Santos, had the word from a friend of his uptown that Tony Finn was an informer (T. 937). Santos also asked Salvato to see if Finn would see him, as Finn owed him \$2,500 (T. 937, 980).

On the night of Finn's death, Salvato left Separate Tables and went alone to Ruby's Bar. There he met Tony Finn and a friend of his. After a half an hour they left and went to Butch's Place where they stayed for an hour (T. 939-940, 981). Upon leaving Butch's, Salvato and Finn went to the Alley Cat arriving there anywhere from 12:30 to 1:00 P.M. Prior to going to the Alley Cat Salvato told Finn that Santos wanted to see him about the \$2,500 (T. 941, 983).

Once at the Alley Cat, Salvato saw Louis, Sally Scudiero, Philly, Carl, Chino, his wife and another girl (T. 941, 985). A short time after they were in the bar, Santos called Finn over. As Finn and Santos were having a discussion an argument broke out and Finn hit Santos. Santos then took out a .45 and shot at Finn who fell to the floor. At that point Sally, Louis and Chino jumped on Finn and started beating him (T. 941-942, 984, 987, 990-991).

Salvato then asked Santos what he was doing, at which

point Sally Scudiero picked up a .375 magnum that fell from Finn's waistband, pointed it at Salvato and told him to mind his own business (T. 942 994). Salvato was then ordered to leave the bar (T. 943, 996).

A month later, when Salvato saw Santos he asked him about what happened the night of Finn's death. Santos told him that Finn had been sitting down and everyone was going to leave him alone, but when he attempted to run through a window, Sally pulled him down and shot him (T. 945). On a second occasion Santos again told Salvato what had happened the night of Finn's death (T. 946).

Salvato then told the jury he was presently incarcerated in jail serving a sentence for the crime of conspiring to import and distribute large quantities of narcotics, and that in the present case he was also charged with the crimes of conspiring to violate the civil rights act and obstruction of justice. On May 2, 1977 he entered a plea of guilty to the obstruction of justice charge and was facing a maximum punishment of five years imprisonment or a \$5,000 fine (T. 950, 998).

He also told the jury that if convicted of the conspiracy to violate Mr. Finn's civil rights he faced life imprisonment (T. 951).

He had plead guilty because he did not want to spend the rest of his life in jail, and in return for his cooperation in the present case he would receive immunity on anything he testified to (T. 952, 998, 1004).

On cross-examination Salvato testified that it was after Finn's death that he learned he was to be arrested and charged with his prior drug dealings with Finn (T. 978).

Prior to his testifying he had been so nervous that he had to see the doctor in jail and was taking both valium and sleeping tablets (T. 1002).

He also stated that in consideration of his testimony, the government was to put his wife and children in a house, and pay for the rent and food while he was in jail (T. 1004).

THE DEFENSE

Mr. JOHN NICHOLAS IANUZZI, an attorney was called by Louis Santos to testify.

His testimony would have shown that within the month preceding the trial of this matter, he had a conversation with Joseph Salvato in which Salvato admitted to him that he was never at the Alley Cat the night of Anthony Finn's death (T. 1285-1296).

JOSEPH A. SALVATO, was recalled to the stand and out of the presence of the jury testified that he was represented in the present matter by Daniel Meyer, Esq. (T. 1414). That purely on a friendship basis he had spoken to John Ianuzzi concerning the present case (T. 1415). However, on a previous case, he had retained and paid for the services of Mr. Ianuzzi (T. 1415-1416).

Concerning the present case, Salvato stated that he spoke to Ianuzzi about three or four times after he had been assigned Mr. Meyer to represent him (T. 1417). During two of those discussions when they went over the facts of the case Louis Santos was present (T. 1418).

On cross-examination Salvato stated that he spoke to Mr. Ianuzzi for the purpose of obtaining legal advice (T. 1419-1421).

Mr. JOHN IANUZZI, was recalled as a witness and testified that he had conferences with Salvato alone; with Salvato and Santos; and with Mr. Mersky and Cabrera on other occasions (T. 1441).

SUMMARY OF ARGUMENT

The testimony of John Ianuzzi should have been allowed in the trial of this matter since it was not the subject of an

attorney-client relationship. Mr. Ianuzzi, who was no more than a friend to Joseph Salvato was never retained by Salvato or asked to aid in his defense.

In addition, the statement of Joseph Salvato that he was not in the Alley Cat Bar does not fall within the category of a privileged communication because taken by itself it is not of an incriminating nature. Even if the statement was privileged, Salvato waived that privilege when he took the witness stand and testified under immunity.

Assuming an attorney-client privilege did exist, the communication was not privileged as it was made in the presence of a third person.

In addition, Salvato waived his privilege when he got on the witness stand and knowingly gave false testimony.

The jury should also know all the facts to best determine the credibility of the witness.

ARGUMENT

- I. THE LOWER COURT SHOULD HAVE ALLOWED THE TESTIMONY OF JOHN IANUZZI IN THE TRIAL OF THIS INDICTMENT.

In the case at bar, the testimony of Joseph Salvato was a key element in the Government's case against Louis Santos. Without Salvato's testimony placing Santos in the Alley Cat Bar on the night of Tony Finn's death, the Government's case would have been very weak. The lack of strength of the Government's case is illustrated by their offer of a plea to Salvato together with additional consideration for his testimony. Without Salvato, the testimony of Benny Rosado² stood to be very suspect.

The defense attempted to introduce the testimony of John Ianuzzi, Esq. to show that on a prior occasion Joseph Salvato had told him that he was not in the Alley Cat Bar on the night in question.

Needless to say, this testimony would go not only to Salvato's credibility, but right to the heart of the case. One need not speculate to realize the impact of Ianuzzi's testimony on the jury once they became aware of the false testimony of Joseph Salvato.

However, Judge Metzner would not allow Mr. Ianuzzi to testify, finding that any communications between Joseph Salvato and John Ianuzzi were privileged and that such statements would not be allowed into the trial of this matter unless Salvato himself waived the privilege (T. 1443-1444).

² On approximately September 9, 1977, appellant learned that in September of 1976 Benny Rosado was arrested in St. Louis, Missouri, for the shooting of a St. Charles County Policeman. This information was not made known to either Santos or the jury during the trial.

At a hearing held outside the presence of the jury it was established that Mr. Ianuz was never retained by Joseph Salvato, and that at the time of his discussions with Mr. Ianuzzi, Salvato already had a court appointed attorney (T. 1414). In addition on two of the four occasions Salvato discussed the facts of the case with Mr. Ianuzzi, Louis Santos was present (T. 1418, 1441).

A. THERE DID NOT EXIST AN ATTORNEY-CLIENT RELATIONSHIP.

Since there never existed an attorney-client relationship, the communications from Joseph Salvato to John Ianuzzi were not privileged and therefore should have been allowed into evidence.

For the communication to be privileged, the relation of attorney and client must exist, and it must exist in reference to the matter to which the communication relates. Rosseau v. Bleau, 131 N.Y. 177, 183.

The evidence in the case clearly demonstrates that at no time did any attorney-client relationship ever exist. Not only was Joseph Salvato represented by counsel, but he never asked, requested or mentioned that Mr. Ianuzzi defend him in the instant matter. There is no question that Mr. Ianuzzi was present during many conferences concerning some of the defendants, however at no time was he acting in the capacity of legal counsel and protecting the interests of a client.

Even Judge Metzner points out:

"Mr. Ianuzzi seems to have been deeply involved in this case without a clearly-defined relationship to the participants." (emphasis added) (T. 1444)

In addition, on March 1, 1977, Mr. Ianuzzi stated to the court he was going to represent either Mr. Cabrera or Mr. Felice, but there was never any mention of representing Joseph Salvato (T. 1443).

There is no testimony in the record, save for an after the fact statement by Salvato, that Mr. Ianuzzi was to represent Salvato in this matter.

B. THE COMMUNICATION WAS NOT PRIVILEGED.

1. Communications from a client to an attorney having no relevance to a fact in issue do not fall into the category of a privileged communication.

The statement made by Joseph Salvato to John Ianuzzi that he was not in the Alley Cat Bar does not fall within the category of a privileged communication because it is completely irrelevant to the facts in issue. In order for a statement to qualify as a privileged communication between an attorney and client, if that relationship does exist, the statement must prejudice the person making it.

Assuming that the statement was the produce of an attorney-client relationship, that privilege was waived by Salvato when he accepted the Government's offer of immunity during his testimony (T. 952).

However, once Salvato took the stand and testified falsely it was then the obligation if not the duty of Mr. Ianuzzi to come forward and inform the court of the false testimony (see Point B-3). In addition, since Salvato's testimony placed the presence of Santos, on the night in question, into issue, the defendant thereby had the right to rebut that material fact.

2. Communications from a client to an attorney in the presence of a third person are not privileged.

Even if there did exist an attorney-client relationship between Salvato and Ianuzzi, the communications between them were not privileged because Salvato chose to tell them to Ianuzzi in front of a third person, namely, Louis Santos.

While it is not required that the client obtain a pledge of secrecy from the attorney, the communication must have been made under circumstances showing that it was the intention of the client to make the communication in confidence. Thus, if the communication is made in the presence of a third person, the privilege does not apply, because the communication, under such circumstances, cannot be deemed to have been intended to be confidential. Rosseau, supra; Doheny v. Lacy, 168 N.Y. 213; People v. Buchanan, 145 N.Y. 1; Baumann v. Steingester, 213 N.Y. 328.

The testimony of Joseph Salvato as well as John Ianuzzi clearly establishes that at least on two occasions discussions were held in the presence of Louis Santos (T. 1418, 1441). Surely the Government cannot argue that a communication is to be considered privileged when it is made in the presence of the party to which it caused the most damage.

3. Communications from a client to an attorney about a fraud to be committed are not privileged.

It is well established case law that the attorney-client privilege does not extend to communications between attorney and client where the purpose of that communication is to further the crime charged in the indictment or future intended illegality.

Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed 993 (1933); Hett v. United States, 353 F. 2d 761, 764 (9th Cir. 1966); United States v. Hoffa, 349, F. 2d 20, 37 (6 Cir. 1965); United States v. Friedman, 445 F. 2d 1076 (1971); United States v. Aldridge, 484, F. 2d 655 (7th Cir. 1973); United States v. Weinberg, 226 F. 2d 161 (3rd Cir. 1955); United States v. Bob, 106 F. 2d 37 (2d Cir. 1939).

Future intended illegality or furtherance of present, continuing illegality need not be shown beyond a reasonable doubt before the privilege can be defeated; it suffices to make out a prima facie case. Clark v. United States, supra; United States v. Bob, supra; Pollock v. United States, 202 F. 2d 281, 286 (5 Cir. 1953).

In the present case, even before Salvato took the witness stand he was well aware of what he had told John Ianuzzi. By testifying he was waiving his privilege and placing Santos' whereabouts into issue thereby inviting the rebuttal of Mr. Ianuzzi.

Salvato's wilful false testimony placing Louis Santos in the Alley Cat Bar on the night of Finn's death directly implicated him in the conspiracy. Allowing that crucial testimony to go uncontradicted severely prejudiced the case against Louis Santos and made the allegations almost impossible to overcome. The testimony of John Ianuzzi would have shown not only that Salvato gave false testimony, but also it was that testimony that was desperately needed to convict Louis Santos.

Salvato should not have been allowed to take the witness stand, testify falsely and then use the attorney-client relationship as a shield in his attempt to perpetrate a fraud on the court and buy his way out of jail³.

C. THE CREDIBILITY OF THE WITNESS WAS
FOR THE JURY TO DETERMINE.

Credibility of a witness is always a question for a jury. United States v. Aviles, 274 F. 2d 179 (2nd Cir. 1960) cert. denied 362 U.S. 974, 80 S. Ct. 1057, 4 L. Ed 2d 1015; United States v. Reina, 242 F. 2d 302, 307 (2nd Cir. 1957); Henderson v. United States, 218 F. 2d 14, 17 (6th Cir., 1955) cert. denied 349 U.S. 920, 75 S. Ct. 660,

³ It cannot be argued that this is simply plain error as it goes directly to the materiality of the Government's case against Louis Santos. Chapman v. California, 386 U.S. 18, 23-24; cf. Fahy v. Connecticut, 375 U.S. 85, 86.

99 L. Ed 1253.

Once Salvato testified and put his credibility in issue, the jury should have been informed of his prior inconsistent statement.

Not only would the jury have discredited this witness' entire testimony, but it would have also changed the entire reflection of the case against Louis Santos. The testimony of John Ianuzzi would have shown that in fact Salvato was not at the bar that night but was attempting to draw Louis Santos into a case he had absolutely no dealings with.

In the interest of justice, the jury should have been allowed this information for it not only goes to the credibility of Joseph Salvato but also to the heart of the case.

CONCLUSION

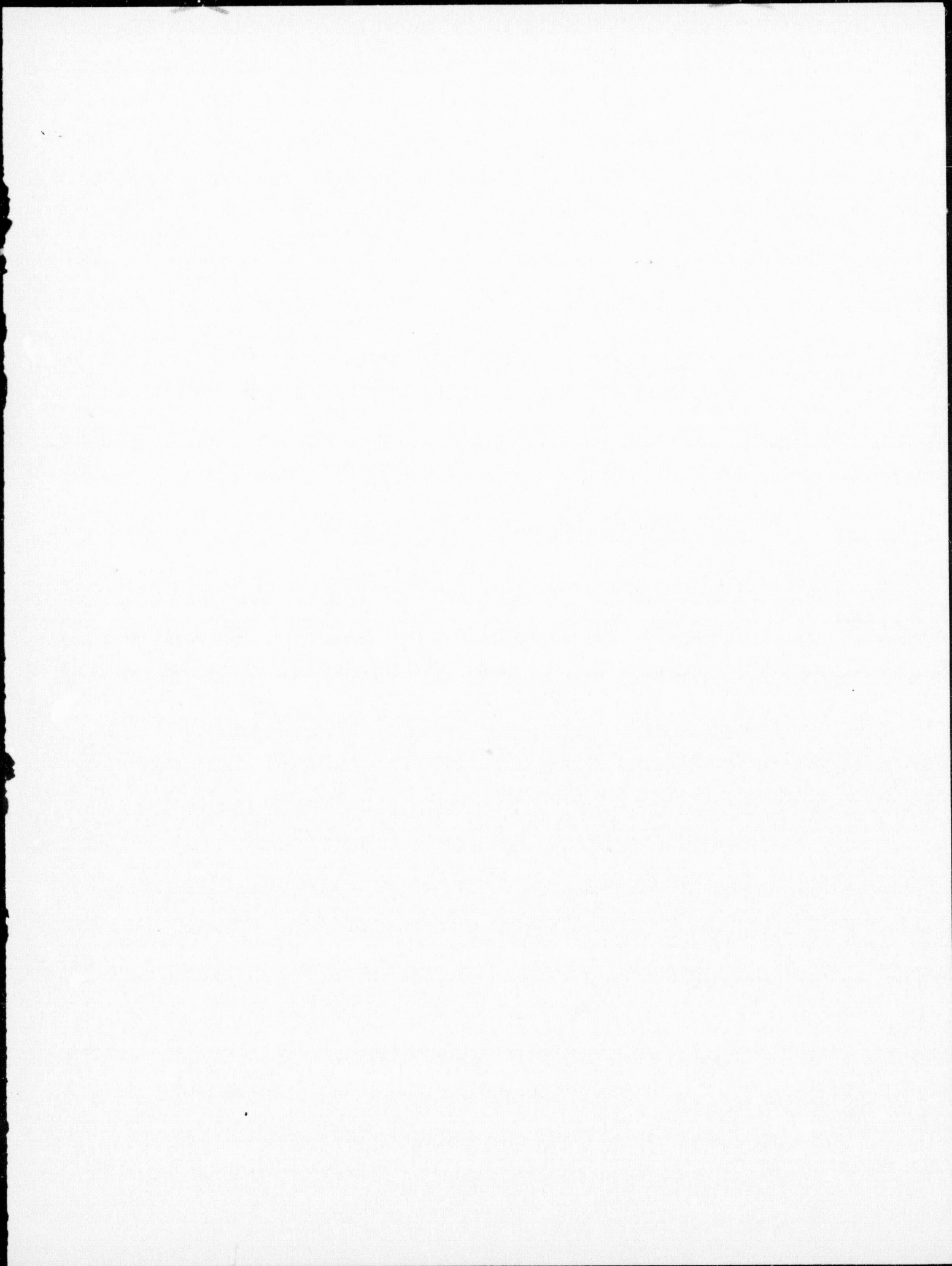
THE CONVICTION SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

HAROLD BORG
Attorney for Appellant
123-60 83rd Avenue
Kew Gardens, NY 11415
(212) BO 1-1200

Of Counsel:

ALAN M. SNYDER



(BORG)

AFFIDAVIT OF PERSONAL SERVICE

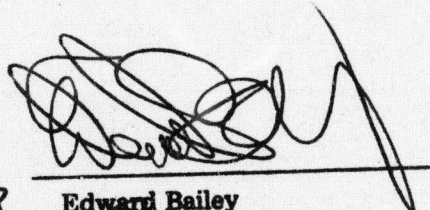
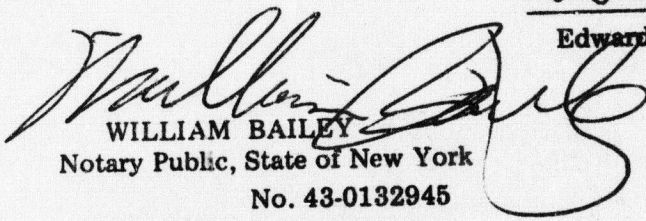
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of September, 1977 at No. St. Andrews Place

deponent served the within brief
upon U.S. ATTORNEY FOR SOUTHERN DISTRICT

the attorney for respondent herein, by delivering 2 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney for appellee therein.

Sworn to before me this 21
21 day of September 1977.


Edward Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978